No. 295

IN THE

Supreme Court of the United States

October Term, 1950

COLONEL HENRY S. ROBERTSON, President, Army Review Board, *Petitioner*

v.

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The Solicitor General, on behalf of Colonel Henry S. Robertson, President, Army Review Board, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled case on June 12, 1950.

OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia (R. 19) is not re-

ported. The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 22-28) is reported at 183 F. 2d 144.

JURISDICTION

The judgment of the court of appeals was entered on June 12, 1950 (R. 29). The jurisdiction of this Court is invoked under the provisions of 28 U. S. C. 1254(1).

QUESTION PRESENTED

The Army Disability Review Board, in reviewing *de novo* an officer's discharge for physical disability without pay, deemed it necessary to consider certain post-discharge Veterans' Administration medical examination reports on that officer.

The question presented is whether a court may, by mandamus, prohibit the Review Board from considering the Veterans' Administration reports, even though the officer and his counsel were given full opportunity to examine the reports, and to present to the Board evidence and testimony for the purpose of rebutting the contents of those reports.

STATUTES INVOLVED

Section 302 (a) and (b) of the Servicemen's Readjustment Act of 1944, as amended, 58 Stat. 287, 59 Stat. 623 (38 U. S. C. 693i (a) and (b)), which authorized the creation of the Army Disability

Review Board and defined its duties and powers, provide as follows:

> (a) The Secretary of the Army, the Secretary of the Navy, and the Secretary of the Treasury are authorized and directed to establish, from time to time, boards of review composed of five commissioned officers, two of whom shall be selected from the Medical Corps of the Army or Navy, or from the Public Health Service, as the case may be. It shall be the duty of any such board to review, at the request of any officer retired or released from active service, without pay, for physical disability pursuant to the decision of a retiring board, board of medical survey, or disposition board, the findings and decisions of such board. Such review shall be based upon all available service records relating to the officer requesting such review, and such other evidence as may be presented by such officer. Witnesses shall be permitted to present testimony either in person or by affidavit, and the officer requesting review shall be allowed to appear before such board of review in person or by counsel. In carrying out its duties under this section such board of review shall have the same powers as exercised by, or vested in, the board whose findings and decision are being reviewed. The proceedings and decision of each such board of review affirming or reversing the decision of any such retiring board, board of medical survey, or disposition board shall be transmitted to the Secretary of the Army, the Secretary of the Navy, or the Sec-

retary of the Treasury, as the case may be, and shall be laid by him before the President for his approval or disapproval and orders in the case.

(b) No request for review under this section shall be valid unless filed within fifteen years after the date of retirement for disability or after [June 22, 1944], whichever is the later.

The powers of "the board whose findings and decision are being reviewed"—the Army Retiring Board—are provided in R. S. 1248, 10 U. S. C. 963:

A retiring board may inquire into and determine the facts touching the nature and occasion of the disability of any officer who appears to be incapable of performing the duties of his office, and shall have such powers of a court-martial and of a court of inquiry as may be necessary for that purpose.

STATEMENT

On October 2, 1942, respondent Robert H. Chambers, then an Army captain, was honorably discharged, for disability and without retirement pay, as the result of the decision of an Army Retiring Board (R. 4.) After the passage of Section 302 of the Servicemen's Readjustment Act of 1944, *supra*, pp. 3-4, respondent applied to the Army Disability Review Board for review of his discharge without pay (R. 4). The Review Board held a hearing at which the "record presented to

the Board was in accordance with the terms of" Section 302 (R. 4), and, on June 11, 1945, the Review Board reversed in part and affirmed in part the findings of the Retiring Board (R. 4).[1]

Respondent's request for a rehearing was later granted by the Review Board on May 19, 1947. He was also notified, 30 days in advance, that the rehearing would take place on October 10, 1947 (R. 4). Prior to that date and "for the purpose of reviewing the record and preparing for the rehearing," respondent and his counsel were afforded access to the entire record to be considered by the Review Board at the rehearing (R. 4). Upon examining this record, they ascertained that it contained certain Veterans' Administration reports on medical examinations of respondent in 1944 (R. 5, 8). Respondent requested the Board to remove those medical reports from the record, contending that Section 302 precluded the Review Board from considering any evidence other than his "service records" and such evidence as he may wish to submit (R. 8, 9). This request was denied because the broad powers vested in the Review Board by Section 302 were viewed as authorizing it to consider evidence obtained by it, on its own motion, from the Veterans' Administration

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[1]The record does not disclose the nature of this partial reversal and affirmance. However, in view of the respondent's subsequent petition to the Review Board for a reconsideration and rehearing of his application for review, it is evident that the Review Board's affirmance included an affirmance of the prior determination discharging respondent without pay.

(R. 10). The rehearing was accordingly rescheduled for April 6, 1948 (R. 5).

On March 29, 1948, a week before the rescheduled rehearing, respondent brought this suit in the District Court of the United States for the District of Columbia, against the President of the Review Board, seeking a mandatory injunction directing that official to exclude the Veterans' Administration medical reports from the record and "to restrict such record to [respondent's] service records and documents submitted by [respondent] as evidence" (R. 2-6). Because of this action, the Board has not yet held the rehearing (R. 23).

The complaint, together with its exhibits, set forth the facts as stated above. The case was argued on a motion to dismiss (R. 17-18). The district court, sustaining the motion, ordered the complaint dismissed on the grounds (1) that mandamus would not lie to control the admissibility of evidence by an administrative board and (2) that the action was brought before respondent exhausted his administrative remedy (R. 19).

On appeal, the court below reversed, holding, in accordance with respondent's complaint, that Section 302 prohibits Review Board consideration of the Veterans' Administration reports (R. 27). The court also ruled that the suit was not dependent upon completion of the Review Board's rehearing (R. 24-26). It accordingly directed the district court "to enter judgment requiring the

Board to withdraw the Veterans' Administration reports from the record before it" (R. 28).

REASONS FOR GRANTING THE WRIT

The decision of the court of appeals, by depriving Disability Review Boards[2] of the power to consider Veterans' Administration medical reports, not only places in jeopardy the decisions rendered by those Boards since their creation under Section 302 of the Servicemen's Readjustment Act of 1944, but also compels the Boards, in reviewing future cases, to shut their eyes to official records indispensable to intelligent review. It reaches that result by overlooking the plain purpose and meaning of Section 302; by ignoring the fact that full opportunity is afforded claimants to rebut, explain, or qualify the contents of the Veterans' Adminis-

[2] It is significant that the instant decision, while involving the Army Disability Review Board, would, if left unreversed, also affect the similar boards constituted by the other services under Section 302, *e.g.*, the Navy Retiring Review Board, 32 C.F.R. 722.1, and the Air Force Disability Review Board, 32 C.F.R. 881.30. In addition, the decision would also limit the powers of the three important service boards established for the purpose of reviewing discharges of officers and enlisted men under Section 301 of the 1944 Act, 38 U. S. C. 693h. See 32 C. F. R. 581.2 (Army), 32 C. F. R. 724.1 (Navy), 32 C. F. R. 881.16 (Air Force). Section 301 contains language almost identical to that of the provision of Section 302 construed by the court below in the instant case.

The number of cases decided by the Army Disability Review Board, in accordance with its present procedure which contemplates use of Veterans' Administration reports whenever available, is shown below at p. 14.

tration reports; and by disregarding the consistent administrative construction of Section 302. Moreover, the decision below fails to give proper effect to decisions of this Court governing the scope of control by mandamus of the actions of executive officers, and is in conflict with the decisions of this Court requiring the exhaustion of administrative remedies before resort to judicial relief.

1. THE POWER OF REVIEW BOARDS TO CONSIDER VETERANS' ADMINISTRATION MEDICAL REPORTS. a. *The purpose and meaning of the statute.* Section 302's direction to the services to establish Review Boards is accompanied by a clear statement of the Boards' statutory function, *i.e.*, to review, upon request, the findings and decisions of Retiring Boards discharging officers "without pay, for physical disability." To determine whether the Retiring Board's decision should be affirmed or reversed, it is obvious that the Review Board must ascertain the true nature and extent of an officer's disability. Such an inquiry into the medical aspects of the case necessarily requires consideration of medical evidence of the character here involved, which throws light on the true physical and mental condition of the officer.

The fact that medical evidence, such as the Veterans' Administration reports in the instant case, became available only after action by the original Retiring Board and the officer's subsequent discharge, does not make that evidence any less ma-

terial to the Review Board's *de novo* review. Such evidence may show that a disability thought by the Retiring Board to be functional and slight was in fact organic and serious. On the other hand, it may show that the Retiring Board mistakenly considered a slight disability to be serious. Likewise, it may show that a disability which the Retiring Board viewed as temporary was in fact temporary, or that the Retiring Board was mistaken and that the disability was actually permanent. Indeed, the best possible evidence as to the permanency of a disability, a question on which the Review Board is compelled to rule in every case, is evidence as to whether the disability has continued or proven permanent since discharge. Whenever permanency of disability as of a particular date is in issue, it is settled that evidence or proof of subsequent events is germane and admissible. *Lumbra* v. *United States,* 290 U. S. 551; *United States* v. *Spaulding,* 293 U. S. 498, rehearing denied, 294 U. S. 731. Fairness of decision demands that the evidence be fully available to the Review Board, whether it favors the retired officer or the Government.

Full recognition by Congress of the broad nature of the Review Board's inquiry is evidenced by the commensurately broad powers conferred on the Review Boards by Section 302. The statute gives the Review Boards "the same powers as exercised by, or vested in, the board whose findings and deci-

sion are being reviewed"—the Retiring Boards. Among the powers of the latter Boards is the specific authority to "inquire into and determine the facts touching the nature and occasion of the disability of any officer who appears to be incapable of performing the duties of his office, and [to exercise] such powers of a court-martial and of a court of inquiry as may be necessary for that purpose" (R. S. 1248, 10 U. S. C. 963). *Supra,* p. 4. Clearly, these powers include the power to compel production of any books, records, and papers material to the physical and mental condition of the officer requesting a Review Board determination. See J. A. G. opinion 1947/8124, Oct. 10, 1947. By the same token, where, as here, the Veterans' Administration medical examination reports were made available voluntarily to the Review Board, its broad powers authorized it to take the reports into consideration. Any other reading makes purposeless Section 302's additional provision that witnesses shall be permitted to testify either by affidavit or personally.

Ignoring these broad powers, the court below emphasized as the only "vital expression" in Section 302, the sentence stating "review shall be based upon all available service records relating to the officer requesting such review, and such other evidence as may be presented by such officer." Viewing these words as "words of exclusion of all evidence not specified in that sentence" (R. 27),

the court ruled that the Review Board was prohibited from considering any evidence other than (1) available "service records" or (2) evidence presented by the discharged officer. The court, in other words, inserted the word "only" in the sentence, so that it read the statute as declaring that "such review shall be based *only* upon" the service records and the officer's evidence. Since the Veterans' Administration medical reports were assumed not to be service records[3] and obviously did not fall within the second category, their consideration by the Review Board would, in the opinion of the court below, violate Section 302.

But, reading the sentence against the background of the broad powers of inquiry conferred on the Review Boards to enable them to effectuate their purpose, it is obvious that the sentence simply means that the Review Board must, *at the least,* consider available service records and the officer's evidence. The sentence in no way justifies the construction that that evidence is the *only* evidence which the Board is permitted to consider. There is no reason to attribute to Congress an intention to blind the appellate Board to other highly pertinent evidence which the subordinate board, whose decision the former is reviewing, was entitled to consider, had it been available.

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[3] It is very questionable whether the assumption that the Veterans' Administration records were not "available service records" within the meaning of Section 302 is correct.

b. *Respondent's ability to examine and rebut the Veterans' Administration reports.* A party to an administrative proceeding may not ordinarily be adjudged on evidence undisclosed to him. Whenever disclosure of the evidence is not prejudicial to the public interest, he must be apprised of the evidence to be considered by the administrative body and "given an opportunity to test, explain, or refute" it. *Int. Com. Comm.* v. *Louis. & Nash. R. R.*, 227 U. S. 88, 93; *United States* v. *Abilene & So. Ry. Co.*, 265 U. S. 274; cf. *Knauff* v. *Shaughnessy*, 338 U. S. 537.

This requirement is carried over into the Review Board's Standard Operating Procedure which expressly provides that the discharged officer "and/or his counsel may inspect, at any suitable time prior to the hearing, any and all documents, files, records, or other evidence * * * which will be presented for consideration by the Review Board."[4] In order to refute, explain, or show possible inaccuracies in such evidence the officer or "counsel of his own selection" are authorized to "appear before the review board in open session" and present testimony through any witnesses they choose "either in person or by affidavit." 32 C. F. R. 581.1 (b) (2) (i).

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[4] See Army Disability Review Board SOP (June 6, 1949), Annex A, par. 15a, superseding an earlier SOP (March 8, 1945) which contained an identical provision.

That this complete opportunity to rebut was afforded respondent in the instant case with respect to the Veteran's Administration reports cannot be challenged here. Indeed, respondent's complaint acknowledges that he and his counsel were given access to the entire record "for the purpose of * * * preparing for the rehearing" (R. 4), and that the record so made available to them contained the Veterans' Administration reports in question (R. 5, 8). Under these circumstances, it is apparent that fairness to respondent does not require exclusion of the reports from consideration by the Review Board, but, rather, that their exclusion necessarily frustrates proper and intelligent review by the Board.

c. *Consistent administrative construction of Section 302(a).* Shortly after Section 302 of the Servicemen's Readjustment Act of 1944 took effect, the War Department, recognizing that intelligent review called for consideration of all available medical evidence, directed the Review Boards to consider "all available War Department and/or other records pertaining to the health and physical condition of the applicant" (WDGAP 334 S/W's Disability Rev. Bd., Oct. 21, 1944, cited in J. A. G. opinion 1947/8124, Oct. 10, 1947). Since that time, the Army has followed that directive consistently and the current recodification of Army regulations contains identical instructions. 32 C. F. R. 581.1

(a) (2) (iii).[5] Under those regulations, the Army Disability Review Board, as of July 28, 1950, had decided 3,261 cases. Veterans' Administration examination reports were assembled and considered in these cases whenever available. In many of the cases in which the Review Board authorized retirement pay benefits, the Veterans' Administration reports constituted the basis for favorable action. They have likewise played an imporant part in many of the disallowed cases.

The rule is well-settled that consistent administrative construction of a statute, controlling the settlement of many cases, is entitled to great weight and "is not to be overturned unless clearly wrong, or unless a different construction is plainly required." *United States* v. *Citizens Loan & Trust Co.*, 316 U. S. 209, 214; *United States* v. *Jackson*, 280 U. S. 183, 193. We have already shown that, at the very least, there is a thoroughly reasonable basis for the administrative construction placed on Section 302 (a). Hence, since that construction is not clearly wrong, the court below erred in setting it aside.

2. MANDAMUS DOES NOT LIE TO COMPEL EXCLUSION OF THE VETERANS' ADMINISTRATION REPORTS. The court of appeals' holding does violence to the firmly-established rule that decisions of adminis-

[5] Similar instructions govern operation of the Air Force Disability Review Board, 32 C. F. R. 881.32 (c), and the Naval Retiring Review Board, 32 C. F. R. 722.3 (g).

trative officers involving the exercise of discretion and judgment, and in so far as they are not unreasonable or plainly wrong, will not be set aside by process in the nature of mandamus. *Wilbur* v. *United States ex rel. Kadric*, 281 U. S. 206; *Denby* v. *Berry*, 263 U. S. 29; *United States ex rel. Girard Trust Co.* v. *Helvering*, 301 U. S. 540; *Keim* v. *United States*, 177 U. S. 290, 292; *Hammond* v. *Hull, et al.*, 131 F. 2d 23 (C. A. D. C.), certiorari denied, 318 U. S. 777; *United States ex rel. Roughton* v. *Ickes*, 101 F. 2d 248 (C. A. D. C.). And "where the duty * * * depends upon a statute or statutes the construction or application of which is not free from doubt, it is regarded as involving the character of judgment or discretion which cannot be controlled by mandamus." *Wilbur* v. *United States*, 281 U. S. 206, 219; see *Decatur* v. *Paulding*, 14 Pet. 497, 515; *Hall* v. *Payne*, 254 U. S. 343, 347-348; *Ness* v. *Fisher*, 223 U. S. 683, 691-692; *Work* v. *Rives*, 267 U. S. 175, 177-178. These rules have been uniformly applied with particular force to matters pertaining to the military establishment, the courts declining to intervene to review or set aside discretionary acts under statutes administered by the War and Navy Departments. *Denby* v. *Berry*, *supra*; *Reaves* v. *Ainsworth*, 219 U. S. 296; *French* v. *Weeks*, 259 U. S. 326; *Creary* v. *Weeks*, 259 U. S. 336.

Certainly, it would appear that the kind and quantity of the medical evidence which the Board

may consider in the discharge of its statutory duty is a matter addressed to its sound discretion and judgment, and not subject to control by mandamus. It cannot be said that the statute's mandate is so plainly in respondent's favor that there is no place for reasonable disagreement. "Where there is discretion, * * * even though its conclusion be disputable, it is impregnable to mandamus." *Alaska Smokeless Coal Co.* v. *Lane*, 250 U. S. 549, 555.

3. RESPONDENT FAILED TO EXHAUST HIS ADMINISTRATIVE REMEDIES. The decision of the court of appeals is also believed to be in error because of the failure to apply the well-settled rule that there must be an exhaustion of administrative remedies before recourse may be had to the courts. *Myers, et al.* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 50-51; *Macauley* v. *Waterson S. S. Corp.*, 327 U. S. 540, 543, 545; *Federal Power Commission* v. *Arkansas Power Co.*, 330 U. S. 802; *Federal Power Commission* v. *Edison Co.*, 304 U. S. 375; *S. E. C.* v. *Otis and Co.*, 338 U. S. 843.

The respondent has been accorded a hearing by the Board, as a result of which the findings of the Retiring Board were affirmed in part and reversed in part. The rehearing which the Board later granted has never been held because, although scheduled on three occasions, it has been postponed twice upon the respondent's request, and a third time because of this suit. The reports in question have never been considered by the Board or any ac-

tion taken thereon, and, until the Board has acted and denied the claim, there is no showing by the respondent of any injury. Only by resorting to speculation and conjecture may an adverse decision be anticipated. For aught that appears, these additional documents may constitute the very evidence needed by the Board on rehearing to reverse completely the findings of the Retiring Board and grant respondent full retirement privileges and any other benefits which may accrue from such changed findings—in which event he would have no cause to complain. This is the very situation contemplated by the exhaustion rule and the reason for its establishment.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

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